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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 715

FLORIDA EAST COAST RAILWAY COMPANY,
Appellant,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

MOTION TO AFFIRM OF APPELLEE SEABOARD AIR LINE RAILROAD COMPANY

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Appellee Seaboard Air Line Railroad Company, hereinafter referred to as Seaboard, pursuant to Rule 16 of the Rules of this Court, moves that the judgment of the District Court be affirmed on the ground that the question raised by the appellant is so clearly lacking in substance as not to warrant further briefing and argument.

QUESTION PRESENTED

Is an order of the Interstate Commerce Commission which granted the Seaboard authority to operate over a portion of the Miami, Fla., terminal facilities of the Florida

East Coast Railway Company, pursuant to Section 3(5) of the Interstate Commerce Act, the proper subject of judicial review?

STATEMENT

For some 37 years the Seaboard and the Florida East Coast Railway Company have both served the Port of Miami, a seaport which is now operated by the Dade County Seaport Department (Seaport Department). The purpose of the Seaboard's 1963 application to the Interstate Commerce Commission, under attack here, is to enable a continuation of the same joint service when the Miami seaport operations are moved to a new port facility being located on Dodge Island, about five blocks away from the existing docks. The latter will be abandoned.

All of the invovled railroad tracks are located in downtown Miami.

As shown on the map which is attached as an appendix, and which is a scaled down portion of Exhibit 4 in the Commission's record, the only tracks leading to the present piers are owned by the Seaport Department (under the name "Miami Municipal Railroad"), and both the Seaboard and the FEC now operate their own equipment to and from the port over those tracks. The Seaport Department's railroad tracks do not serve the new Dodge Island site, however.

Unless the Seaboard constructs new track in downtown Miami, an impracticable and unnecessary project, it will be able to reach the port only by operating over 3220 feet of the existing FEC track. The Commission's decision, upheld by the lower court, would permit the Seaboard to operate its trains over that segment of track.

The record before the Commission shows that the Seaport Department, and the County which it represents, desire a continuation of the same switching and terminal service

which has been rendered at the existing port for many years. For that reason, four years ago they requested the Seaboard and the FEC to make the necessary arrangements for performing such operations at the new facility. However, the FEC would not permit any use of its terminal tracks by the Seaboard and, when no agreement could be reached, it became necessary to file the disputed Section 3(5) application.

That application was the subject of hearings before a Hearing Examiner on September 30, 1963, and on April 8-9, 1964, at Miami. About a year later, after the Examiner had recommended approval of the application, the Commission granted the authority which was sought.

The Commission's order also provides for retention of jurisdiction by the agency so that, in the event the two railroads cannot agree as to the compensation to be paid by the Seaboard, the parties may come back to the Commission, which will then make that determination for them. This retention of jurisdiction is in conformity with Section 3(5) of the Act.

On appeal, a three-judge District Court upheld the Commission's action in a decision dated June 24, 1966.[1] The appellant is before this Court on a direct appeal from that final judgment of the District Court.

Since the FEC's appeal does not question the Commission's conclusions that the Seaboard proposal would be practicable, would not do harm to FEC operations, and would be in the public interest, this appellee will rely upon the lower court's affirmance of those findings and proceed directly to the only issue brought here. In essence, the FEC focuses its appeal on the proposed 585-foot connection

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[1] The opinion of the three-judge District Court in this case is found at *Florida East Coast Railway Co. v. United States*, 256 F. Supp. 986 (1966).

shown in red on the map attached to this motion; saying that the Commission's order is not ripe for judicial review because the Seaboard did not seek and obtain authority to build that connection.

ARGUMENT

It is noteworthy, we think, that the only party appealing the Commission's decision is the party which bases its plea entirely on the premise that the Commission's decision is not appealable.

The FEC raised that same issue before the court below:

> "East Coast argues, therefore, that the Commission's order is not final and hence not now reviewable."[2]

The three-judge court met that argument head on, and, quite properly, reached this conclusion:

> "We cannot agree. 'The true test [of ripeness] is the substantiality of present or imminent harm which the administrative action inflicts on the plaintiff.' 3 Davis, Administrative Law § 21.07, at 176-77 (1958). See Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407, 424-425, 62 S. Ct. 1194, 86 L.Ed. 1563 (1942). One key factor is whether the order determines legal rights. 3 Davis, supra, at 177. The present order clearly does so, ordering one carrier to allow another carrier to use its track. This determination of the parties' legal rights may be the final action taken by the Commission in this dispute, as the parties may agree upon the terms of compensation. Most important, the effective date of the order does not depend on the establishment of the terms of compensation as long as the use of East Coast track is 'adequately secured * * * before the said use shall be commenced.'

[2] Id., page 988.

> See also Missouri-Kan.-Tex. R.R. v. Kansas City Terminal Ry., 198 I.C.C. 4, 5 (1933) (track used for 4 years before compensation settled)."[3]

Making further reference to the connecting track which is the subject of this appeal, the lower court then pointed out:

> "East Coast further argues that the order deprives it of property without due process of law. In order for Seaboard to move its trains on and off the East Coast tracks sought to be used, construction of a short connecting track will be desirable or possibly necessary. East Coast urges that § 1(18) of the Interstate Commerce Act requires Commission approval (using the more strict 'public convenience and necessity' standard) before the connection can be built, that no request has been made to the Commission for its approval, but that the present order conclusively binds the Commission to grant such approval in the future, thereby depriving East Coast of the right to a full and fair hearing on Seaboard's application. Seaboard contends that connection comes within the § 1(22) exemption, obviating the need of Commission action."[4]

The court then was perfectly correct in concluding:

> "We need not decide, however, whether the proposed construction comes within § 1(18) or § 1(22), for East Coast's complaint of the lack of due process is premature. Even if Commission approval is needed, we cannot presume that the Commission will disregard its obligations to give East Coast a fair hearing and to apply the stricter standard of 'public convenience and necessity.' After such a hearing, if one is needed, the Commission could, consistent with the order now under

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[3] Id., page 988.
[4] Id., page 989.

review, withhold its approval of the construction, but Seaboard would be able to serve the port by obtaining acceptance of a different type of connection or by using a preexisting, though possibly less efficient, connection. In any event, East Coast can complain about the denial of a fair hearing and the use of improper standards only after they occur. They presently have not."[5]

Appellant makes much[6] of the fact that the District Court relied, in part, upon this Court's decision in *Columbia Broadcasting System*,[7] and urges that such reliance was in error. Not so; for *Columbia Broadcasting System*, as probably will be the case here, involved a situation in which an agency ruling "attach(ed) legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control".[8] Here, as we shall point out in a moment, contrary to the FEC's contention, there will be no further action before the Commission with regard to the disputed 585-foot track connection. Indeed—and, again we will discuss this in more detail later—that connecting track need never be constructed in order for the Seaboard to operate over the terminal tracks which are the subject of the Commission's outstanding order. Here, the compensation to be paid by Seaboard to the FEC—for which Congress, in Section 3(5), made provision for subsequent Commission hearings and adjudication; and which probably will be the subject of such hearings and adjudication—is the order "that may follow" and be "controlled" by the Commission's existing

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[5] Id., page 989.

[6] FEC's Jurisdictional Statement, pages 12-13.

[7] *Columbia Broadcasting System* v. *United States*, 316 U.S. 407 (1942).

[8] Id., page 425.

order. The FEC should not misunderstand the lower court's use of *Columbia Broadcasting System* because, in the same paragraph citing that decision, the District Court, referring to the Commission's order, said:

> "This determination of the parties' legal rights may be the final action taken by the Commission in this dispute, as the parties may agree upon the terms of compensation."

Once again, the lower court's conclusion is quite proper.

We also would respond to the FEC's overall argument in this way. First, it is important to note that appellant urges its point because, in its opinion, a Section 1(18) application must be, and will be, filed with the Commission for authority to construct the 585-foot connecting track shown in red on the attached drawing. Thus, the FEC's Jurisdictional Statement says:

> "The Commission concedes that its determination covers only part of an overall operational plan, which can be implemented only after essential connecting tracks have been constructed by Seaboard under a certificate 'that the present or future public convenience and necessity require or will require' construction and operation of such tracks."[9]

This premise—basic to the FEC's argument—is, however, false.

The Commission has not, at any time during its handling of this case, "conceded"—or in any other way stated—that the Seaboard must obtain from it a certificate to build any

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[9] FEC's Jurisdictional Statement, page 9.

track connection related to the port proposal which was being considered.

The FEC's Jurisdictional Statement says, further, that:

> "Seaboard can not construct that connection—and consequently use East Coast's track—unless and until it obtains from the Commission, pursuant to the provisions of section 1(18) of the Act, a certificate authorizing such construction."[10]

Once again the FEC's argument fails, not only for the reasons stated by the lower court, but, additionally, because no Section 1(18) authority to construct the 585-foot connection is needed; and no such authority will be sought of the Commission. The reason why none will be requested, and why the Commission has not stated that further certification of the present plan is necessary, deserves comment, and that follows.

In considering the FEC's argument it is necessary to know that the disputed connecting track is located at 11th Street and First Avenue in Miami. Then, it must be kept in mind that there already is a connecting track at 11th Street and First Avenue. As the FEC's President said, that track:

> "* * * has been used as an interchange facility between the railroads for many years * * *."[11]

The existing connecting track is the same connection which the FEC proposed to use in interchanging port cars with

[10] Id., page 11.

Note: References to "Tr." are to the Reporter's Transcript forming a part of the record before the Commission.

[11] Tr. 218. Also, for example, see Tr. 35, 54, 145-146.

the Seaboard if a so-called FEC plan had been found satisfactory by the Commission instead of the Seaboard plan.[12] In other words, as can be seen from the attached drawing, and from the testimony, the Seaboard actually could perform its proposed service to Dodge Island without the new connecting track; but, of course, the backing of rail cars over First Avenue and over 11th Street could cause difficulties with vehicular traffic and makes the proposed new connection a more practical one.

Also, it is clear throughout the record that the Seaboard would use the FEC track, and the 585-foot connection to it, only for switching movements.

Insofar as the Federal statutes are concerned, Section 1(18) of the Interstate Commerce Act requires a carrier to obtain Commission authority before constructing an extension of a line of railroad. It is Section 1(18) upon which the FEC relies in its argument. On the other hand, the Seaboard relies upon Section 1(22) of the Interstate Commerce Act which exempts from the certificate requirement of Section 1(18) the construction of such terminal facilities as "spur, industrial, team, switching or side tracks."

There are many Commission and court decisions treating with the question of whether a particular piece of track is an "extension" or whether it is exempt under the provisions of Section 1(22). However, the leading case is the *Texas & Pacific* decision[13] where, at page 278, this Court had this to say on the subject:

> "When the clauses in paragraphs 18 to 22 are read in the light of this congressional policy, the meaning and scope of the terms extension and industrial track be-

[12] Tr. 201-203, 217-220, and 26.

[13] *Texas & P. Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U.S. 266 (1925).

come clear. The carrier was authorized by Congress to construct, without authority from the Commission, 'spur, industrial, team, switching or side tracks * * * to be located wholly within one state.' Tracks of that character are commonly constructed, either to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, who being within the same territory and similarly situated are entitled to like service from the carrier. * * * If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of ¶ 18, although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks."

Under the principles laid down in *Texas & Pacific*, then, it is clear that the final test in determining whether proposed trackage constitutes an extension within the meaning of Section 1(18) is whether the effect of the new trackage is to extend substantially the line of a carrier into new territory.

Here, there will be no extension into a new territory by virtue of the construction of the proposed connecting track. Instead, there will be constructed a better connection than the existing one; and that connection merely will permit a better switching operation than is possible over the existing track lay out.

There are, of course, literally thousands of such track connections as we are discussing in this case throughout the United States, and it simply is not conceivable that Congress intended each one of them to be the subject of Commission Section 1(18) approval. To so hold would be to say, in effect, that there is no point to Section 1(22).

A clear method of distinguishing between extensions and new lines, on the one hand, and switching tracks, on the

other, was pointed out by the Supreme Court of Kansas, which said:

"The distinguishing feature between 'extensions' and 'new lines' on the one hand, and 'spur, industrial, team, switching, or side tracks' on the other, as used within 49 U.S.C.A. Sec. 1, pars. 18-22, is this: That the former are tracks over which there are to be train movements in the sense that such movements are a part of the actual transportation haul from shipper to consignee, while the latter named tracks are for use in loading, reloading, storing, and switching the cars, and other things merely incidental to the regular train haul."[14]

Since the Seaboard already has an existing track connection at the location of the new connecting track, and since the operation proposed by the Seaboard will but replace an existing operation, the following language concerning track relocations from another Commission decision also is pertinent:

"We have in the past assumed jurisdiction in those cases of railroad relocation whenever the proposed change concerned service to shippers; the development of new territory or traffic; established more competition or otherwise changed existing competitive situations; affected, more than ordinarily, a carrier's revenues or operating expense; or was related to the matter of rail transportation generally. See *New York Central R. Co. Abandonment and Construction*, 158 I.C.C. 309."

* * *

"The proposed line will perform the same service and be operated in the same manner as the present one. No shippers or shipping stations are involved, and

[14] *Missouri Pacific R. Co.* v. *Chicago, Great Western R. Co.*, 19 Pac. 2d 484, 489 (1933).

there is no invasion of the territory of another carrier or the opening up of any new traffic areas. The competitive situation will remain the same and no changes need be made in tariffs, routings or connections. Under the circumstances we are of the opinion that the proposed construction, abandonment, and acquisition of operating rights over the tracks owned by the City of St. Louis, Mo., constitute a relocation of a track not within our jurisdiction under section 1(18)-(20) of the act. Accordingly, an order will be entered dismissing the application for lack of jurisdiction."[18]

Also, with respect to connecting-track relocations, the following Commission language is pertinent:

"At this point the Union Pacific will construct new connecting tracks and change certain cross-overs to conform to the new operation. Also a portion of the present Union Pacific segment to be used between Liberty and Santa Fe Streets is to be relocated by that carrier in order to provide the applicants with a more direct movement through this busy section of the Union Pacific yards. Such construction will not extend the line of the Union Pacific inasmuch as it amounts to a relocation only of an existing track and furthermore will be used by that carrier only for transfer or switching movements."[19]

There are a whole host of Commission and court decisions on this point. We will not burden this Motion with them. Suffice it to say, however, that the proposed 585-foot connection, being both a relocated track and a switching track, clearly comes within the exemption of Section 1(22) in either category.

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[18] *Missouri Pac. R. Co. Trustee Construction*, 282 I.C.C. 388, 391-392 (1952).

[19] *Chicago, M., St. P. & P. R. Co. Trustees Construction*, 267 I.C.C. 690, 692 (1947).

No Section 1(18) authority has been sought, and none will be sought. The Commission had before it the entire Seaboard proposal.

Finally, one other point requires comment. The Commission's statement that its approval of the Seaboard application was not to be construed as authorization of any "other * * * construction projects,"[17] to which statement the FEC points in its Jurisdictional Statement,[18] neither changes the facts nor suggests that the Commission thinks that the proposed connection requires approval. Contrary to the FEC's argument, the Commission simply did not say that Section 1(18) authority is necessary for construction of the 585-foot connection. It but admonished this appellee that any "*other* essential track construction projects" [emphasis added to "other"] not presented in the Seaboard's proposal might require authority. As the Commission has said before, it has no authority to issue an order regarding facilities over which it has no jurisdiction;[19] and its order regarding this Section 3(5) application is merely said by the Commission not to be construed as a grant of authority to construct a piece of track either over which the Commission has no jurisdiction or about which it has not been informed.

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[17] Commission's Report, page 9.

[18] FEC's Jurisdictional Statement, page 7.

[19] *Hild* v. *Chicago, N.S. & M.R. Co.*, 150 I.C.C. 367, 370-371 (1929), citing, incidentally, the *Texas & Pacific* decision of this Court.

CONCLUSION

In summary, it is clear that the Seaboard need not obtain Interstate Commerce Commission authority to construct the short connecting track which is the subject of the Question presented in this appeal. For that reason, the Commission had before it the entire Seaboard proposal, and its decision regarding that proposal is ripe for appeal.

Assuming, for the sake of argument only, that Commission authority is required before the Seaboard may construct the 585-foot connection, the Commission's outstanding order still is reviewable. That is true for at least two reasons. The first is that the Seaboard may make use of the involved FEC terminal facilities by operating over the existing—though less efficient—connecting track, without ever building the disputed 585-foot connection. Thus, the Commission's order is final, without question. Then, as the lower court pointed out, the Commission's granting of Section 3(5) authority enabling the Seaboard to operate over the FEC's terminal facilities affects appellant adversely and it finally determines the issue of whether the FEC's tracks may be used. That is, the Seaboard's right to use those tracks has been finalized. The legal consequences of the Commission's order under Section 3(5) of the Interstate Commerce Act, therefore, make the order subject to review by the courts.

It is respectfully submitted that the appellant has presented no substantial question for the decision of this Court, and that the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

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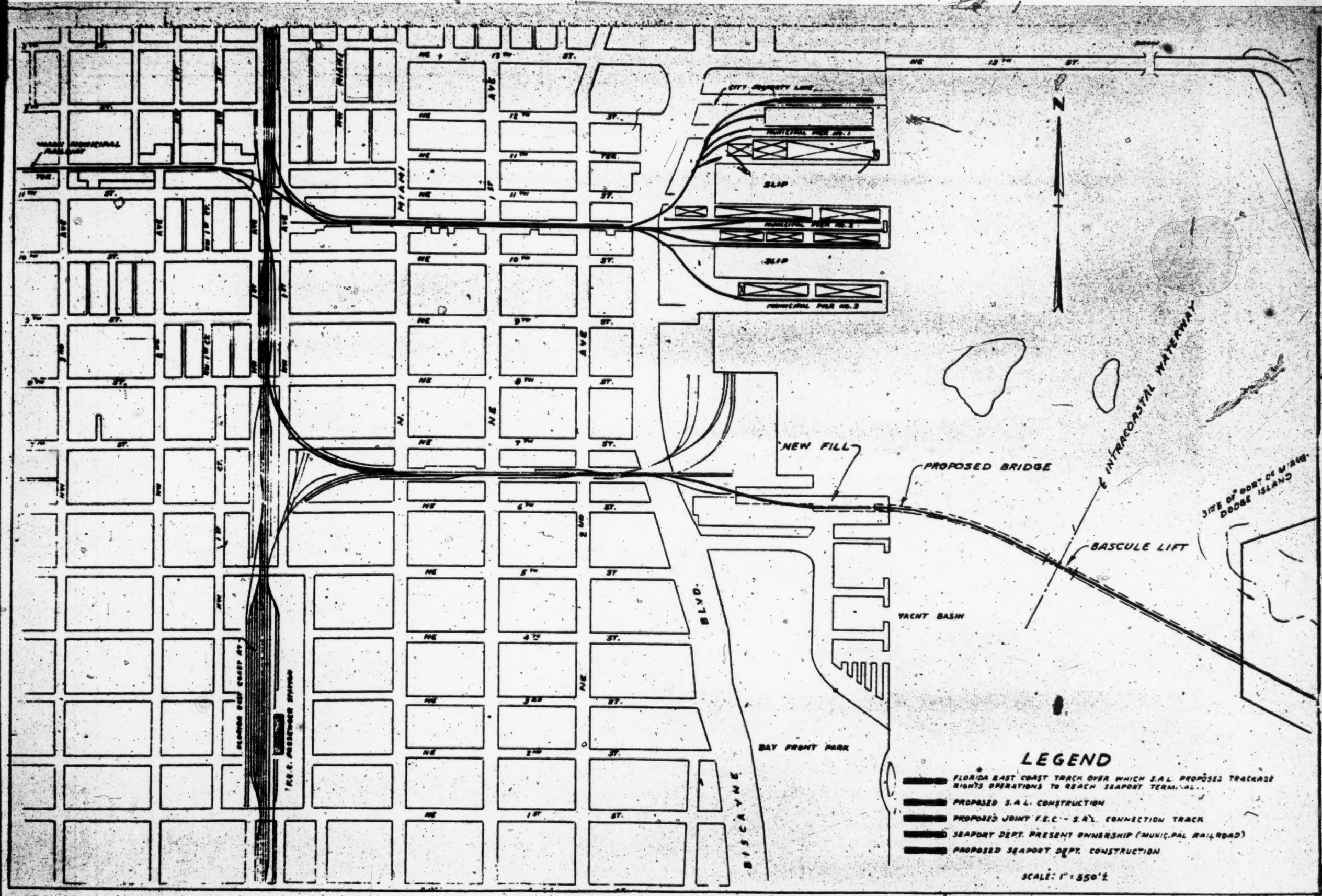
MIAMI AVE
N. MIAMI AVE
N.E. 2 AVE
BISCAYNE BLVD.
CITY PROPERTY LINE
SLIP
SLIP
NEW FILL
PROPOSED BRIDGE
BASCULE LIFT
YACHT BASIN
BAY FRONT PARK
FLORIDA EAST COAST AV.
F.E.C. PASSENGER STATION
N
LEGEND
FLORIDA EAST COAST TRACK OVER WHICH S.A.L. PROPOSES TRACKAGE RIGHTS OPERATIONS TO REACH SEAPORT TERMINAL.
PROPOSED S.A.L. CONSTRUCTION
PROPOSED JOINT F.E.C. - S.A.L. CONNECTION TRACK
SEAPORT DEPT. PRESENT OWNERSHIP (MUNICIPAL RAILROAD)
PROPOSED SEAPORT DEPT. CONSTRUCTION
SCALE: 1" = 350'±